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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LENO BUSTILLOS, Defendant and Appellant.	B235542 (Los Angeles County Super. Ct. No. KA092764)

APPEAL from a judgment of the Superior Court of Los Angeles County. Geanene M. Yriarte, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Leno Bustillos was convicted of first degree robbery and making criminal threats. The trial court sentenced him to a total of 81 years to life. Appellant contends that the trial court should have stayed the consecutive sentence for count 2 and granted appellant's *Romero*[1] motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Irving Rodriguez (Irving) lived with his father in a trailer park in El Monte. Around noon on December 7, 2010, appellant knocked on Irving's trailer and asked if he knew where a man named Marco was. Marco was a former tenant of the trailer park. Irving had seen appellant with Marco around the trailer park before. Irving never had any problems or prior relationship with appellant.

Irving told appellant he did not know where Marco was. Appellant then took out a five-inch folding knife and walked into Irving's trailer. Irving stepped back into the trailer as appellant approached. Once inside, appellant continued to point the knife at Irving and told him "not to try to do anything stupid or else [he would] stab [him] in [his] chest." He also told him that he had two friends outside who would burn down Irving's trailer should he try to do anything stupid. Appellant stated that he was on the run from the police, "so not to call them or anything." Irving testified that he was scared of getting stabbed when appellant threatened him.

Appellant put his knife away, asked where Irving's important equipment was, and began searching the trailer. Irving was able to convince appellant not to take his laptop because he needed it for school. Nonetheless, Irving saw appellant take some money by his bed, his father's dental equipment, some boxes containing credit cards and ID's, and his father's pocket knife. Appellant stashed the items in Irving's backpack and a laundry basket. He then asked Irving if he had any tools. Irving told him the tools were outside. Appellant put on the backpack, took his knife back out, and walked outside with Irving.

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

When appellant approached the storage door for the tools, Irving jumped on his back and began to squeeze him. Appellant had previously been holding his knife in his left hand. Irving was pretty sure that the knife would have stabbed appellant in the neck because of the way that Irving had been squeezing him. After wrestling for about 10 seconds, appellant threw Irving off his back and said, "You fucked up." Irving then ran straight to the house of the trailer park manager.

Carlos Salas (Carlos), the manager's son, testified that when Irving arrived, he stated, "I just got robbed. I stabbed him and he left. . . . Call the cops." While Irving told the manager and Carlos what had happened, a white Ford Explorer sped out of the park's other entrance. Appellant was in the car. As he drove by, he made eye contact with Irving and gestured with his hand at him as if simulating the cocking motion of a gun. Carlos testified that appellant appeared to be smiling. Carlos also noted that appellant made an audible "Bam, bam" noise while gesturing. Carlos knew the person in the car was appellant because he recognized his voice and the way he looked. Irving testified that appellant looked "furious." He was scared when he saw appellant because he thought he was going to come right back.

When the police arrived, Irving returned to his trailer and determined that the backpack appellant had been wearing was gone. The next day, detectives located the white Ford Explorer in the parking lot of a hospital 10 minutes away. The car was registered to appellant's wife, Susan Bustillos. Detectives located a backpack resembling Irving's in the passenger seat of the car. They also found a box containing computer equipment. Ramiro Rodriguez, Irving's father, identified the box, as well as two watches that had been in the car, as his property. Detectives arrested appellant when he was discharged from the hospital later that evening.

The jury convicted appellant of first degree residential robbery (Pen Code, § 211;[2] count 1) and the crime of making criminal threats (§ 422; count 2). As to each count, the

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[2] All further references are to the Penal Code unless otherwise noted.

jury found the deadly and dangerous weapon allegation to be true within the meaning of section 12022, subdivision (b)(1). The trial court denied appellant's *Romero* motion and sentenced appellant to a total of 81 years to life. As to count 1, appellant was sentenced to 41 years: a base sentence of 25 years to life plus five-year enhancements for each of appellant's three priors pursuant to section 667, subdivision (a)(1), plus a one-year enhancement pursuant to section 12022, subdivision (b)(1). As to count 2, appellant was sentenced to 40 years: a base of 25 years to life plus five-year enhancements for each of appellant's three priors (§ 667, subd. (a)(1)). The trial court struck the punishment for the enhancement under section 12022, subdivision (b)(1) on count 2 in the interest of justice.

DISCUSSION

A. Consecutive punishment for criminal threat conviction

Appellant argues that when he threatened to burn Irving's home or stab him and when he told Irving not to call the police, he was satisfying the force or fear element of the robbery. Appellant thus asserts that the threats were part of the same course of conduct as the robbery and that it was error under section 654 to impose a consecutive sentence for count 2. In response to appellant's section 654 argument, the Attorney General contends that appellant's threats to Irving were in furtherance of an objective[3] other than robbery. The Attorney General thus argues that the trial court's consecutive sentencing for count 2 was proper. We do not agree with the rationale of respondent's argument.

A defendant may only receive punishment for the objective or objectives that his offenses sought to further. (*People v. Britt* (2004) 32 Cal.4th 944, 952). If one offense is merely """a means toward the objective of the commission of the other,""" a defendant may not receive punishment for both. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215). Accordingly, we will not reverse a trial court under section 654 unless we find that the prosecution failed to present substantial evidence that appellant's offenses were

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3 The specific objective being dissuading the victim from calling the police.

incident to more than one objective. (*Id.* at pp. 1214-1215). Here, appellant's only evident reason for threatening Irving during the robbery was so he would be able to carry out his theft. The threats not only worked to instill fear in Irving and to prevent him from stopping appellant—it also served to prevent the police from being able to enter the scene and halt appellant's criminal behavior. Other than working to ensure a successful robbery, the evidence does not show any other intention appellant could have had in ordering Irving to not call the police or in threatening to harm him and his home should he do anything "stupid." Thus, we conclude that in this respect, appellant only harbored one objective. Nevertheless, we hold that other substantial evidence of a different threat did exist to justify consecutive punishment for appellant's criminal threat conviction.

At trial, the prosecutor argued to the jury in closing argument that when appellant drove away, gesturing his hand like a shooting gun, he made a criminal threat. Appellant contends that such action does not constitute a criminal threat because neither Irving nor Carlos testified that appellant made any sound when he gestured. For a gesture to amount to a criminal threat under section 422, a verbal sound must accompany it. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1439 [holding that defendant's "shush" or "sh" sound was enough to constitute a verbal statement, thus rendering his gesture a criminal threat].) However, the record clearly reflects Carlos's testimony at trial, where he states that appellant said "Bam, bam" as he gestured and drove away. In fact, Carlos testified that the sound of appellant's voice was how he was able to recognize appellant in the first place. Thus, appellant's contention that his gesture does not violate section 422 is incorrect.

The only question then is whether appellant's last criminal threat was incident to the same objective as the robbery. We find that it was not. Appellant made his separate objective clear as he drove past Irving, smiling and shooting his hand like a gun directly at him. At that point, appellant had already successfully left the premises with Irving's belongings. The robbery was complete. Appellant's gesture was no longer a means of ensuring his ability to take Irving's belongings; it rather evinced his sole intent to prevent police involvement by threatening harm to Irving. We thus conclude that the prosecution

did present substantial evidence to support the finding that appellant's gesture had a separate objective of preventing a report to the police. Accordingly, we affirm the trial court's consecutive sentencing for appellant's criminal threat and robbery convictions.

B. Appellant's *Romero* Motion

Appellant contends that the nature and remoteness of his prior strikes render him outside the spirit of the Three Strikes law. Appellant thus argues that the trial court abused its discretion when it refused to dismiss all but one of appellant's prior strikes. We disagree.

The purpose of the Three Strikes law is to punish criminals who have a tendency to commit offenses that pose a threat to public safety. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1080-1081). In reviewing a trial court's decision to refuse to strike a defendant's prior convictions, we will not reverse unless appellant clearly shows that the trial court's sentencing was so irrational or arbitrary that no reasonable person could agree with it (*People v. Carmony* (2004) 33 Cal.4th 367, 378). For such a decision to have been reasonably just, however, the trial court must have taken into account the "nature and circumstances of the present crimes; the defendant's prior convictions; his background, character, and prospects." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474-475). In *People v. McGlothin*, at page 476, for example, the court abused its discretion when it struck one of defendant's prior convictions on the sole basis that it personally believed "'the level of crime in this case did not warrant a 25-year-to-life sentence.'" On the other hand, in *People v. Carmony*, the trial court weighed important factors in refusing to strike the defendant's prior convictions; although the defendant's current offense was very technical and nonviolent, the court recognized that the defendant nonetheless had substance abuse problems, an extensive criminal history, and poor future prospects. Because such an analysis was neither arbitrary nor irrational, our Supreme Court held that the trial court's ruling did not constitute an abuse of discretion. (33 Cal.4th at p. at 379.)

Lastly, we note that the passage of time between a defendant's prior felony convictions and his present offense need not have been a consideration in the trial court's

analysis. (*People v. Williams* (1998) 17 Cal.4th 148, 163). For example, in *Williams*, the court held that the fact that 13 years had passed between defendant's prior felony conviction and his present felony was insignificant. The defendant "did not refrain from criminal activity during that span of time, and he did not add maturity to age." (*Ibid.*)

Here, the trial court outlined its specific considerations and reasoning in denying appellant's *Romero* motion. It reviewed and discussed the particular facts of appellant's extensive criminal history, including appellant's past weapon usage. It noted that appellant had already been subject to the Three Strikes law, yet had evaded a life sentence. It also considered appellant's background, character, and prospects as it read letters from appellant and his family members. The trial court even praised appellant when it discussed the future of his Soldiers for God program. Nonetheless, the court ultimately concluded that the dispositive factor in the case was the fact that appellant's pattern and history of criminal activity had not ceased. As a result, the trial court held that appellant was not an exception to the Three Strikes law.

Appellant has not shown that the factors the trial court looked at were improper; he simply disagrees with the conclusion of the court's analysis. Accordingly, appellant has failed to show that the trial court made its decision in an irrational or arbitrary manner. We thus reject appellant's contention that the trial court's analysis constituted an abuse of discretion.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.